

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

**ARAKELIAN ENTERPRISES, INC. D/B/A
ATHENS SERVICES**

Employer

and

Case 31-RD-223335

JULIO PORRES

Petitioner

and

**PACKAGE AND GENERAL UTILITY DRIVERS,
LOCAL 396, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Union

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by Julio Porres (Petitioner) on July 6, 2018, under Section 9(c) of the National Labor Relations Act (the Act), seeking to decertify the Package and General Utility Drivers, Local 396, International Brotherhood of Teamsters (Union) as the exclusive collective-bargaining representative of a unit of employees employed by Arakelian Enterprises, Inc. d/b/a Athens Services (Employer) at its Los Angeles/Sun Valley, California facility (Employer's facility) located in Los Angeles County. There are approximately 11 employees in the petitioned-for unit.

Following the filing of the petition, Region 31 of the National Labor Relations Board (the Board) informed the parties on about July 16, 2018 that the petition would be blocked and placed in abeyance consistent with the Board's blocking policy while Region 31 investigated related unfair labor practice violations alleged in Cases 31-CA-223801, *et al.* Consistent with the Board's blocking policy, Region 31 kept the petition in abeyance while Cases 31-CA-223801, *et al.*, remained open pending investigation and subsequent litigation. Following the issuance of a Decision and recommended Order by the Honorable Jeffrey D. Wedekind on December 30, 2019 in Cases 31-CA-223801, *et al.*, Region 31 resumed processing of the petition. On February 27, 2020, I approved a Stipulated Election Agreement (Agreement) in which the parties agreed that a Board-conducted manual election be held in this case on March 19, 2020 at the Employer's facility. On March 16, 2020, due to the extraordinary circumstances related to the COVID-19 pandemic, I issued an Order Postponing Election, which postponed the election indefinitely. On March 19, 2020, due to the COVID-19 pandemic, the Board suspended all elections, including mail ballot elections, until April 3, 2020. On April 1, 2020, after determining measures were in place at the Regional level to allow elections to resume in a safe and effective manner, the Board did not extend this suspension, but allowed elections to resume as determined by the Regional

Directors. On April 17, the Board issued a press release indicating that its representation petitions and elections are being processed and conducted by its regional offices. The Board further provided that consistent with their traditional authority, its Regional Directors have discretion as to when, where, and if an election can be conducted in accordance with existing Board precedent. In doing so, the Board stated that its Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. Thus, on April 23, 2020, in light of the changed and extraordinary circumstances arising from the COVID-19 pandemic, I issued an Order Revoking Approval of Stipulated Election Agreement and Rescheduling Hearing (April 23, 2020 Order).

A telephonic hearing on the petition was held on May 1, 2020 before a Hearing Officer.¹ No issues were litigated at the hearing. The only matter addressed at the hearing was whether to direct a manual or mail ballot election given the current extraordinary circumstances arising from the COVID-19 pandemic. In addition, before and at the hearing, the Employer objected to the hearing being conducted by telephone and to my decision not to permit the parties to present witnesses. At the hearing, the Employer and the Union also objected that the Hearing Officer did not provide a presentation regarding the mechanics of how a potential mail ballot election and mail ballot count would be conducted, particularly a mail ballot count conducted by videoconference, before they were requested to provide their positions on the record regarding the dates and method of such a mail ballot election.

As to the sole matter addressed at the hearing, the Employer and the Petitioner object to a mail ballot election. The Employer objects to a mail ballot election, contending that a manual election can be safely conducted with the precautions/procedures outlined by the Employer. In addition, the Employer also contends that the Board has not adequately described the procedures it would use for a mail ballot election and mail ballot count and does not have appropriate safeguards in place to ensure the safety and proper chain of custody of the mail ballots. The Petitioner did not further specify the reasons why he objects to a mail ballot election. The Union does not oppose a mail ballot election but prefers that a manual election occur at the earliest practicable date that a manual election can be conducted safely.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. For the reasons set forth in my April 23, 2020 Order and further set forth below, I affirm my decision to order that the pre-election hearing be held telephonically, without any witnesses, to elicit all parties' positions on the record regarding the type of election to be directed. Furthermore, based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail ballot election commencing on the earliest practicable date.

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¹ The hearing in this matter was consolidated and held concurrently with the hearing in Case 31-RD-223318 with the understanding that a separate decision would issue in each case.

I. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic

The impact of the COVID-19 pandemic on daily life has been profound. As of May 7, 2020,² over 1,219,066 people in the United States have been infected with COVID-19 and over 73,297 people have died from it.³ The Centers for Disease Control and Prevention (CDC) has determined that the best way to prevent the illness is to avoid being exposed to the virus.⁴ Many of the measures recommended by the Federal and state governments to prevent the spread of the virus are well-known at this point: maintain a 6-foot distance between individuals, work or engage in schooling from home, avoid social gatherings, avoid discretionary travel, and practice good hygiene. *The President's Coronavirus Guidelines for America*,⁵ CDC, *How to Protect Yourself and Others*.⁶

Additionally, although not directly addressing NLRB elections, I note that the CDC has specifically issued guidance on elections, *Recommendations for Election Polling Locations*⁷ (CDC Election Guidance), stating that officials should encourage mail-in voting. This CDC guidance provides as follows:

Actions for elections officials in advance of election day

Encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.

- Encourage mail-in methods of voting if allowed in the jurisdiction.

The CDC has also issued publications regarding presymptomatic transmission of COVID-19, including a Morbidity and Mortality Weekly Report Early Release posted online on April 1, *Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020*⁸ (CDC Weekly Report). The CDC Weekly Report emphasizes, “The potential for presymptomatic transmission underscores the importance of social distancing, including the avoidance of congregate settings, to reduce COVID-19 spread.”

Many state and municipal governments have also issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 19, the Governor of the State of California (Governor) issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations of the Federal Critical Infrastructure Sectors.

² All dates hereafter are in 2020 unless otherwise indicated.

³ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁵ See <https://www.whitehouse.gov/briefings-statements/coronavirus-guidelines-america/>.

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

⁸ See https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm?s_cid=mm6914e1_w.

On May 4, the Governor issued a press release⁹ announcing that based on California's progress in meeting metrics tied to indicators, California can begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the situation is "still dangerous and poses a significant public health risk." The Governor further announced that while California will be moving from Stage 1 to Stage 2, its "counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020." *Id.*

At the local level, on April 10, the Los Angeles County Department of Public Health (County Department of Public Health) updated its "Safer at Home" Health Officer Order (County Order), which remains in effect until May 15. The County Order has social (physical) distancing requirements for individuals and businesses. The County Order is aligned with Executive Order N-33-20, which requires Californians to stay at home unless performing essential activities. On May 6, the County Department of Public Health issued a Roadmap to Recovery, indicating that Los Angeles County will begin to ease restrictions on non-essential businesses beginning May 8 but only with respect to a very limited type of non-essential businesses and only for curbside pick-up and with adherence to distancing and infection control protocols.¹⁰ In issuing the Roadmap to Recovery, Los Angeles County has noted, "The coronavirus is still deadly and capable of quickly taking many lives. As L.A. County moves into its first stage of recovery, all residents, business owners and employees must continue to observe and practice all COVID-19 physical distancing requirements."¹¹

Although communities nationwide have taken these steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. As of May 7, according to data released by the Los Angeles County Department of Public Health website, there were 29,427 confirmed cases of COVID-19 in Los Angeles County and 1,418 Los Angeles County residents have died from COVID-19.

B. The Employer's Ongoing Operations

The Employer, which is engaged in the business of providing waste sanitation services in Los Angeles County, is included within the essential services to remain operational during the COVID-19 pandemic. As a result, the Employer's employees continue to report to work at the Employer's facility and perform their regular duties, to ensure that the public has continued waste sanitation services. The Employer has implemented a number of safety protocols and social distancing practices applicable to all employees at the Employer's facility as it has continued to operate during the COVID-19 pandemic. As of the date of the hearing, the

⁹ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>.

¹⁰ See <http://www.publichealth.lacounty.gov/media/Coronavirus/docs/HOO/RoadmapToRecovery.pdf>. See also https://covid19.lacounty.gov/recovery/?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

¹¹ See https://covid19.lacounty.gov/recovery/?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

Employer reported that, to its knowledge, none of its employees employed at the Employer's facility had tested positive for COVID-19.

During the COVID-19 pandemic, the Employer has provided its employees several CDC publications, including, but not limited to: *Social Distancing – COVID-19*, *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19*, *Cleaning and Disinfecting Your Facility*, and *Symptoms of Coronavirus Disease 2019*. The Employer also issued an Occupational Safety SAFE Brief to its employees around February 27, to educate its employees about COVID-19.

The Employer represents that it is following CDC guidelines for all of its employees reporting to work at its facilities during the COVID-19 pandemic, including providing its employees personal protective equipment (PPE) – including 3M brand N-95 face masks (N-95 masks), hand gloves, disinfectant sprays and wipes, and hand sanitizer gels – to ensure its employees and their equipment stay sanitary. The record does not reflect whether the provided N-95 masks are fitted or what training employees are given on the use of the N-95 masks. The Employer's employees employed at the facility are also required to wear additional PPE unrelated to COVID-19, including work boots, reflective vests or jackets, and gloves. In addition, all individuals entering the Employer's facility are given a verbal health screening, and the Employer performs a temperature check of each employee to ensure the employee does not have an elevated temperature.

The record does not reflect the size of the space in which the employees at the Employer's facility work, other than the Employer's description that it is a large and open area. According to the Employer, there was no need to place floor markings for its approximately 11 unit employees to maintain social distance, as there is sufficient space at the Employer's facility to ensure appropriate social distance is maintained when all of its employees are present. During the hearing, the Employer represented that it had not had an increase in sick calls since the COVID-19 pandemic and that, to its knowledge, there were no known or suspected cases of COVID-19 among any of its employees.

With respect to keeping the Employer's equipment sanitary, the Employer's employees are expected to wipe down all touched surfaces in the exterior and interior of the Employer's equipment upon exit and entry to ensure that the equipment is sanitized. Further, when the Employer's drivers go out on their routes, each driver wears a N-95 mask and gloves in public and remains in the vehicle while delivering and picking up waste bins, without interacting with the public outside of the vehicle. Drivers typically obtain fuel for the Employer's vehicles at the Employer's facility or at other Employer facilities near their routes. After drivers deliver or pick up waste bins from customers, they return to the Employer's facility.

The Employer's bin maintenance employees follow CDC guidelines on social distancing, frequent hand washing, and wearing the Employer-issued PPE, including N-95 masks, at all times when they are not painting the waste bins at the Employer's facility. Bin maintenance is an assembly-line type process where employees: wash the bins using high pressure washers without any close contact with other employees; weld the bins, repairing any cracks, cuts, or holes; and paint the bins wearing masks specialized for providing protection from paint fumes.

C. The Employer's Proposed Safety Precautions for a Manual Election

The Employer presented a detailed and helpful description of the measures it would take to try to ensure that any manual election in this matter could be conducted safely despite the COVID-19 pandemic. The Employer stated that to the extent that any party or the Board suggests additional safeguards that the Employer could do to make the election even safer or to make participants more comfortable, the Employer is willing to consider those suggestions.

The Employer proposed that the number of participants at the pre-election conference be limited so there is not a gathering of individuals present in one location for the typically 15 to 30-minute period needed for such a pre-election conference. The Employer stated that it would be willing to consider holding the pre-election conference in a different area if the parties preferred it, such as next to a garage door that could be opened, outside, or even by teleconference, if necessary. The Employer also proposed that each party have one observer (totaling three observers) and one Board agent present during the election to limit the number of individuals present in the voting room.

The Employer further proposed that the election take place in an employee breakroom at the Employer's facility. The record does not specify the dimensions of this employee breakroom. The Employer has offered to mark off the employee breakroom and the flooring along the route drivers would use to enter the employee breakroom at six-foot intervals to allow for social distancing by employees waiting to vote in a manual election. The record is not clear whether there are any exterior windows or whether all windows in the employee breakroom have blinds, but blinds or other coverings would be placed on the windows so no one inside the Employer's facility would be able to see into the employee breakroom while the election was underway. The Employer represented that the employee breakroom is ventilated with filtered air.

The Employer has also offered to provide the same PPE it provides and requires for its employees for any person attending the election, including the Board agent assigned to conduct any manual election.¹² Such Employer-provided PPE includes N-95 masks, gloves, hand sanitizer, sanitation wipes, and disinfectant spray that the Employer already makes available to all of its employees throughout the Employer's facility, and the Employer is prepared to provide the same PPE to anyone present at the Employer's facility for a manual election.

The Employer has also agreed to provide enough pens or pencils for all voters to mark their ballots with separate pens or pencils, eliminating the need for people to touch the same pen or pencil and for the Board agent to distribute and collect pens or pencils that may have been touched by every voter in the unit.

¹² It is unclear whether the Region would be able to accept the PPE provided by the Employer. See, for example, the concern raised by the Regional Director of Region 28 in the Decision and Direction of Election in *Baker Commodities, Inc.*, Case 28-RC-259125, issued on April 29, 2020, that acceptance of such PPE might violate the Anti-Deficiency Act.

D. The Parties' Positions Concerning Election Details

With respect to the proposed date for the election, the Employer has proposed to conduct the manual election as early as practicable, on Thursday, May 21; Thursday, May 28; or the earliest Thursday that the Region thinks would work to conduct a manual election. With respect to proposed polling times, the Employer has proposed two voting sessions, one from 5:30 a.m. to 7:30 a.m. and one from 3:00 p.m. to 5:00 p.m.

As indicated above, while the Union does not oppose a mail ballot election, the Union prefers that a manual election be conducted and agrees with all of the Employer's proposals for a manual election set forth above. The Petitioner opposes a mail ballot election and also agrees with all of the Employer's proposals for a manual election set forth above.

Finally, all parties agreed that: the Employer's employees are paid weekly, with the pay period ending on Sunday; there are no eligibility formulas applicable to this election; and it is appropriate for the Board to provide its Notices of Election and ballots in Spanish and in English.

II. ANALYSIS

A. The Pre-Election Hearing

With respect to the Employer's objection to my ordering that the pre-election hearing be conducted telephonically without any witness testimony, in the Employer's Statement of Position, it contends:

[T]he Hearing Officer must allow the parties to make a full and complete record of their positions on the election location at the Hearing, including the appropriate examination of witnesses and introduction of evidence. The Region Director has a duty "to adduce and weigh evidence relevant to these factors in determining where to conduct the ... election." See *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1820 (2011)(emphasis added); Casehandling Manual, Sec. 11301.4 ("In the event a hearing is held during the course of processing the petitions, the Hearing Officer will explore the parties' positions regarding election arrangements, but parties shall not be permitted to litigate the issue."). To effectively discharge this duty, the Regional Director must, as in any investigation, solicit and duly consider the parties' positions, sworn witness testimony, and exhibits that bear on the propriety of the election location.

Contrary to the Employer's assertion, the *2 Sisters Food Group, Inc.* (2 Sisters) Board decision does not support its argument that there must be a full hearing with testimony. *Id.* To the contrary, in that case, the Board specifically states when discussing factors to consider in deciding on remand whether to conduct the election at the Employer's facility that "[o]n remand, the Regional Director shall afford the Respondent an opportunity to address (*but not litigate*) this issue." (emphasis added). *Id.* Further, in *2 Sisters*, the Board notes the Regional Director's discretion in setting the location of an election based on "the many imponderables which are seldom reflected in a record." *Id.* at 1819. The Board's reference to such "imponderables which

are seldom reflected in a record” clearly does not indicate that the Regional Director’s decision must be based on witness testimony at a pre-election hearing. Additionally, I note that this Board decision specifically recognizes the Regional Director’s discretion to order mail ballot elections in appropriate circumstances. *Id.* at fn. 13. Thus, nothing in *2 Sisters* requires a Regional Director to permit witness testimony on the issue of whether to conduct a manual or mail ballot election.

The same is true based on the Board’s rules and case-handling guidance. For example, the Board’s rules note that the pre-election hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination whether a question of representation exists. See Board’s Rules and Regulations Sec. 102.64(a). A pre-election hearing is investigatory, not adversarial. See Board Casehandling Manual Part Two, Representation Proceedings, Sec. 11181 (Casehandling Manual). Further, the type of election to be conducted, the sole matter addressed at the hearing here, is not a litigable issue. See the Board’s Rules and Regulations, Sec. 102.66(g)(1). Thus, nothing in the Board’s Rules and Regulations or in the Casehandling Manual require witness testimony when deciding whether to conduct a manual or mail ballot election.

As to the Employer’s objection that the hearing was conducted telephonically, Section 9(c) of the Act does not require a full in-person or video evidentiary hearing in every case. Rather, it requires “an appropriate hearing.” Based on the foregoing and in light of the extraordinary circumstances arising from the COVID-19 pandemic in Los Angeles County at the time I issued my April 23, 2020 Order and when the pre-election hearing was conducted on May 1, and out of concern for the safety of all parties and Board personnel, I determined that “an appropriate hearing” in this proceeding would be a pre-election hearing conducted telephonically, particularly given that there were no litigable issues and that no witness testimony was going to be adduced. I note that during the telephonic hearing, the Court Reporter briefly dropped from the call twice. However, this did not cause any party to lose or otherwise be unable to present any evidence or arguments they so desired. Accordingly, for the reasons noted in my April 23, 2020 Order and for the reasons detailed above, I affirm my decision to hold the hearing telephonically and without witnesses.

As to the Employer’s and the Union’s objection that the Hearing Officer should have provided the parties a presentation regarding the mechanics of a mail ballot election and a mail ballot count, particularly a mail ballot count conducted by videoconference, there is no basis for this objection. First, I note that at the hearing, each party was given the opportunity on the record to provide its “position on the date and method of the count.” No party chose to give its position on the record as requested regarding the dates of any mail ballot election or the method of any mail ballot count. Instead, each party simply objected to the Board conducting a mail ballot election in this proceeding. The Employer objected repeatedly during the hearing to conducting any mail ballot count by videoconference but did not further elaborate its position regarding the method of any mail ballot count beyond its opposition set forth in its Statement of Position. With respect to the dates of any mail ballot election, at the hearing, the Employer provided, “Never.” The Union and the Petitioner took no position at the hearing regarding the dates for any mail ballot election. Second, as acknowledged by the Employer in its Statement of

Position, ““In the event a hearing is held during the course of processing the petition, the Hearing Officer will explore the parties’ positions regarding election arrangements, but parties shall not be permitted to litigate this issue.”” Casehandling Manual, Sec. 11301.4. Cf. *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954). This is precisely what occurred in the instant hearing – all parties were given the opportunity to present their positions regarding the election arrangements, including the dates of any mail ballot election and method of any mail ballot count. Finally, nothing in the Act, the Board’s Rules and Regulations, or the Casehandling Manual requires a demonstration during a pre-election hearing of the steps and manner in which a mail ballot election will be conducted, including the count, before the parties are asked to state their positions on the details of a mail ballot election. To the extent that a party finds an aspect of the mail ballot election process was objectionable, its due process rights are protected and can be exercised by filing timely objections after the election.

B. The Election

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees’ union representation preference and to certify the results of such elections. The Board’s obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.¹³ Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has made it clear that mail ballot elections need not be reserved only for the most extraordinary circumstances, reasoning that “neither our precedent nor common sense supports such a stringent approach to the use of mail ballots.” *Sutter Bay West Hospitals*, 357 NLRB 197, 198 (2011). Indeed, the Board has always acknowledged that circumstances may necessitate adaptations on the Board’s part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*

¹³ In its April 17, 2020 press release, the Board stated that Regional Directors have discretion with respect to when, where and if an election can be conducted in accordance with existing Board precedent and the Board specifically noted that Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

The Board has determined that there are some instances in which a mail ballot election is appropriate because “of circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that extraordinary circumstances may warrant a departure from the specific guidelines articulated in that case. *Id.*

I acknowledge that absent public health concerns, I would not order a mail ballot election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. As noted above, current Federal, State, and Los Angeles County public health guidance strongly recommends discouraging gatherings, and a mail ballot election minimizes such risk. As of May 7, approximately 29,427 residents of Los Angeles County have confirmed cases of COVID-19 and 1,418 Los Angeles County residents have died from COVID-19. The Employer’s employees remain working at the Employer’s facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an alternative to conducting a manual election.

I find that the COVID-19 pandemic presents an extraordinary circumstance that makes conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the unit employees’ union representation preferences at this time. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election.

Although the Employer has offered certain accommodations in an effort to allow for some degree of social distancing and protection during the election, manual election procedures inherently require substantial interaction. Voters, observers, and party representatives would all need to appear at the Employer’s facility to participate in the election. Party representatives, the observers, and the Board agent would have to gather for approximately 15 to 30 minutes for the pre-election conference, including the check of the voter list and the parties’ inspection of the voting area. The Board agent and observers would need to share the employee breakroom, a space of unspecified size for the duration of the proposed manual election spanning four hours. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent. The Board agent must provide a ballot to each voter, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election lasting at least four hours, the Board agent and observers might need to use a restroom at the Employer’s facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, typically held in the same voting area, with the observers, party representatives, and other employees who wish to attend.

In these circumstances, the substantial interaction inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer. Although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Although the Employer's policy is to send home any employees who display symptoms of COVID-19, any election participant could be an asymptomatic carrier of the virus.

Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line that would not normally be necessary if the employee were performing work duties, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election. The Board's manual procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote.

Additionally, conducting manual elections under the current circumstances could disenfranchise voters. If any employee displays symptoms during the 14 days before the election, the Employer's protective measure of sending home employees with COVID-19 symptoms could result in employees being unable to participate in a manual election. Moreover, guidance from the County Department of Public Health goes even further than the Employer's measures and, thus, increases the possibility of voter disenfranchisement; this is so because the County Department of Public Health guidance dictates a 14-day self-quarantine not just for symptomatic individuals but for anyone who has been in close contact with someone who has or is suspected to have COVID-19.¹⁴ Similarly, during the current public health crisis, employees may be disenfranchised because they are wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation.

The Employer argues that a mail ballot election presents greater risks due to the need to touch the mail. However, with respect to the safety of mail, CDC guidance states that "[a]lthough the virus can survive for a short period on some surfaces, it is unlikely to be spread from products or packaging that are shipped over a period of days or weeks at regular temperatures." See *What Mail and Parcel Delivery Drivers Need to Know about COVID-19*.¹⁵ Additional CDC guidance, *Running Essential Errands*,¹⁶ recommends, "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol." The Employer also argues that the Board is unable to specify the exact chain of custody of the mail ballot from the time that it is mailed by the Board until the time it is counted at the ballot count by the Board agent. However, as in all mail ballot elections, the Region intends to take all necessary precautions to maintain an appropriate and secure chain of custody for the ballots.

¹⁴ See <http://publichealth.lacounty.gov/acd/ncorona2019/covidquarantine/>.

¹⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/mail-parcel-drivers.html>.

¹⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

Since all parties - the Employer, the Union, and the Petitioner - prefer a manual election, I do not take my determination to conduct a mail ballot election lightly. I do not find that a manual election is impossible, or that a mail ballot election is the only appropriate option. However, I have determined that, under the current circumstances, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay. In fact, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages mail-in methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board's duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees' union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency's obligations and responsibilities, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

III. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁷
3. The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹⁷ The Employer, Arakelian Enterprises, Inc. d/b/a Athens Services, a California Corporation with a place of business in Los Angeles, California, is engaged in the business of providing waste sanitation services. Within the past 12 months, a representative period, the Employer's gross revenues exceeded \$500,000 and during this same period, the Employer purchased and received goods, supplies and materials valued in excess of \$5,000 directly from enterprises located outside the State of California.

6. The following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time employees working at the Employer's facility at 11266 Peoria Street, Los Angeles, CA 91352 in the following classifications: Driver (Class A/B), Utility Driver (Class A/B), Rear Driver, Front Driver, Roll Off Driver, Recycle Driver, Sweep/Barrell Driver (Class A/B), Bin Driver (Class A/B), Pull Out Driver, Utility Driver (Class C), Porter, Helper/Swamper, Truck Mechanic I, Truck Mechanic II, Truck Mechanic III, Truck Welder, Parts Clerk, Tire Repair, Lube Service, Truck Washer/Shop Utility, Bin Welder, Bin Painter, and Bin Washer.

Excluded: All other current classifications and employees, including but not limited to Dispatchers, Leads, Foremen, Sales employees, as well as all professional employees, business office clerical employees, technical employees, other nonprofessional employees, guards, managers and supervisors within the meaning of the National Labor Relations Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 11 employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **PACKAGE AND GENERAL UTILITY DRIVERS, LOCAL 396, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

A. Election Details

I have determined that a mail ballot election will be held for the reasons I have explained above.

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. On **Tuesday, May 26, 2020**, ballots will be mailed to voters by an agent of Region 31 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, June 5, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 31 office by close of business (5:00 p.m.) on **Tuesday, June 16, 2020**. All ballots will be commingled and counted by an agent of Region 31 of the National Labor Relations Board on **Friday, June 19, 2020 at 2:00 p.m.** likely via a videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Sunday, May 3, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States who are present in the United States may vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Tuesday, May 12, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this Decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.** For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Los Angeles, California this 8th day of May 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
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Los Angeles, CA 90064-1753